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get in the legal title without knowledge of the prior interest, he will be in the usual position of a *bona fide* purchaser and cannot be disturbed.<sup>14</sup> This situation arises not in contradiction to the analogy between the transference of legal and equitable interests, but from the inherent nature of the equitable interest, which is a right *in personam* in the course of becoming a right *in rem*. Consequently, the hazard of losing the *res* necessarily attends its owner;<sup>15</sup> but it is a hazard which seems no more anomalous than the danger attendant upon legal ownership of being divested through the doctrines of confusion or accession or adverse possession. The conception of an equitable ownership lost through the equitable situation seems no more difficult than that of a legal ownership lost through operation of law.

Again, just as a legal estate, burdened with an equitable charge, passes to a *bona fide* purchaser stripped of the encumbrance, it would seem that an equitable estate similarly encumbered should also be protected. This conclusion has been reached<sup>16</sup> and is expressly based on the doctrine of *bona fide* purchase which, however, like the equitable maxims, seems to be only a more or less imposing way of saying that, under any given state of circumstances, the better equity will win.<sup>17</sup> Finally, it should follow that if the *cestui*, defrauded by a third party, sell to one without notice who in turn sells to one with notice, the latter should be safe, unless he be the trustee himself originally guilty of fraud. This result was reached in the recent case of *Yost v. Critcher* (Va. 1911) 72 S. E. 594, where a certain piece of real estate was conveyed to a trustee for himself and others, and he, by concealing the true value of the property, indirectly induced one of his associates to sell his interest to a *bona fide* purchaser who soon afterwards resold to the trustee. In impressing this repurchase with the trust, the court based the decision on the fiduciary relationship of the partnership situation, it being the duty of a managing partner to exercise the very highest degree of good faith towards his co-partner.<sup>18</sup> Though it seems impossible to base an actual partnership on a mere land deal without the carrying on of any business,<sup>19</sup> yet the court's decree is unquestionable, since an express trustee is bound to exercise every possible care.<sup>20</sup> And even in the absence of a trust, the fiduciary duty raised in a joint enterprise of this kind would justify the conclusion reached.<sup>21</sup>

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ENFORCEMENT OF RESTRICTIVE AGREEMENTS IN EQUITY.—When land is granted subject to a restrictive agreement which falls short of a covenant which will run at law, and does not amount to the reservation of an easement, equity will nevertheless enforce the restrictions

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<sup>14</sup>See *Newman v. Newman* (1885) L. R. 28 Ch. D. 674, where the trustee cuts off the assignee's interest.

<sup>15</sup>Langdell, *Eq. Pl.*, (2nd ed.) § 184.

<sup>16</sup>*Lane v. Jackson* (1855) 20 Beav. 535; *Penny v. Watts* (1848) 2 DeG. & Sm. 501, 521; *contra*, *Jordan v. Black* (N. C. 1811) 2 Murph. 30; see 2 *Pomeroy, Eq. Jur.*, § 743.

<sup>17</sup>See 11 COLUMBIA LAW REVIEW 554.

<sup>18</sup>*Pomeroy v. Benton* (1874) 57 Mo. 531.

<sup>19</sup>*Burdick, Partnership*, 27 *et seq.*

<sup>20</sup>*Smith v. Howlett* (N. Y. 1898) 29 App. Div. 182.

<sup>21</sup>*Spier v. Hyde* (N. Y. 1904) 92 App. Div. 467, 472.

against any subsequent owner until it reaches the hands of a *bona fide* purchaser,<sup>1</sup> upon the familiar principle that the court will impose upon one knowingly taking a *res* in derogation of prior rights or upon a volunteer, an obligation to make restitution.<sup>2</sup> Likewise when the parties intend that the restrictions upon the grantee's land shall be for the benefit of the grantor as owner of neighboring land, which is subsequently conveyed with an express assignment of the contract, it would seem that the assignee would be entitled to all the aid which the courts of law and equity alike would have given the assignor. But it often happens that equity will confer the benefit of such agreements in the absence of an express assignment;<sup>3</sup> and this is true even though the purchaser bought the land without knowledge of the restrictions.<sup>4</sup> The true principle underlying the passing of these benefits in equity is by no means clear. The analogy to the enforcement of covenants running with the land and the protection of easements is not very suggestive because in those cases the benefit passes as a matter of law, and equity is doing nothing more than enforcing a legal right. Furthermore, the benefit of restrictive agreements pertaining to personal as well as real property are enforced by equity,<sup>5</sup> so it would seem that if the doctrine can be explained at all it must be upon other grounds. Since the tendency of the more recent decisions is to limit the passing of the benefit to cases where the contract expressly states that it is not only for the benefit of the promisee but for subsequent owners,<sup>6</sup> the suggestion that with the conveyance of the land the law implies an assignment of the contract<sup>7</sup> very plausibly explains those cases where the conveyance by the promisee took place after the restrictive agreement had been made. But in situations such as that in the recent case of *Coates v. Cullingford* (1911) 131 N. Y. Supp. 700, this theory is quite inadequate. In that case a tract of land was divided into lots which were sold subject to similar restrictions for the benefit of the whole, and one purchaser sought to enforce against a subsequent purchaser a restrictive covenant made by the latter when he bought his land. It is obviously impossible to imply an assignment of the defendant's contract with the conveyance to the plaintiff, because at that time the contract did not in fact exist, and yet in such cases

<sup>1</sup>*Whatman v. Gibson* (1838) 9 Sim. 196; *Mann v. Stephens* (1846) 15 Sim. 377; *Tulk v. Moxhay* (1848) 2 Phillips 774; see *Whitney v. Union Ry. Co.* (Mass. 1858) 11 Gray 359. For collection of cases see Ames, Cases in Eq. Jur., 149.

<sup>2</sup>See Langdell, Brief Survey of Eq. Jur., 11; *Tulk v. Moxhay supra*; *Brewer v. Marshall* (1868) 19 N. J. Eq. 537.

<sup>3</sup>*Whatman v. Gibson supra*; *Clark v. Martin* (1865) 49 Pa. 289. For collection of cases see Ames, Cases in Eq. Jur., 172.

<sup>4</sup>*Child v. Douglas* (1854) Kay 560, 571.

<sup>5</sup>*Abergarw Brewery Co. v. Holmes L. R.* [1900] 1 Ch. 188; *Francisco v. Smith* (1849) 143 N. Y. 488.

<sup>6</sup>*Renals v. Cowlshaw* (1876) L. R. 9 Ch. Div. 125. To the same effect *Rogers v. Hosegood L. R.* [1900] 2 Ch. 388. See discussions of doctrine in *Equitable Life Assurance Soc. v. Brennan* (1896) 148 N. Y. 661; *Korn v. Campbell* (1908) 192 N. Y. 490. The limitations placed by *Renals v. Cowlshaw* do not seem to apply to personalty. See *Abergarw Brewery Co. v. Holmes supra*.

<sup>7</sup>*Giddings, Restrictions upon Use of Land*, 5 Harv. L. Rev. 282; see *Lydyck v. B. & O. R. R. Co.* (1880) 17 W. Va. 427, 442.

it is well established that the action can be maintained.<sup>8</sup> It has been offered as an explanation of the case last given that since the promise of each purchaser is for the benefit of the others, the grantor by implication holds the promise of each in trust for the others, and the plaintiff obtains his right in equity as a *cestui que trust*, but if this is true, the difficulty arises as to how the *cestui* can proceed directly against the third party. Again, an alleged maxim that equity will compel the promisor to perform his agreement according to its tenor has been proposed as a solution.<sup>9</sup> Undoubtedly this is what equity does in the case under consideration, but if this were a general principle of equity it would seem that the beneficiary of any contract could bring an action, which is obviously untrue. The only instance where such a principle is recognized is in the case of the holder of a negotiable instrument payable to bearer, who sues in his own name, not as assignee, but as the *persona designata* within the tenor of the instrument.<sup>10</sup> But this is a peculiar result of the law merchant, and it is difficult to see what application it can have to the enforcement of restrictive contracts in a court of equity.

It seems therefore that the results reached by the courts, some reasoning by analogy to covenants which run at law,<sup>11</sup> others by analogy to easements,<sup>12</sup> and still others upon equitable principles,<sup>13</sup> cannot be entirely explained upon established principles, but must be accepted as a further extension of equity jurisprudence, whereby in a limited class of cases the interests of beneficiaries of a contract are recognized and protected; and merely because the doctrine is anomalous it is not to be condemned, since in a majority of cases it evidently effectuates the ends of justice.

Restrictions, like other agreements, are subject to the familiar rule that equity will not lend its aid where to do so would work an unreasonable hardship, and accordingly when a defendant has been allowed to make expensive improvements without objection,<sup>14</sup> or when the character of the neighborhood has so changed as to make an observance of the restrictions fruitless,<sup>15</sup> or when by releasing some of the land-owners the plaintiff has defeated the object of the restrictions,<sup>16</sup> they will not be enforced. Thus in the principal case, the court refused the plaintiff relief because he himself had violated a similar agreement made for the benefit of the defendant's land.

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<sup>8</sup>Nottingham Brick Co. v. Butler (1886) L. R. 16 Q. B. D. 778; Barrow v. Richard (N. Y. 1840) 8 Paige 351. The right of grantees from a common grantor to enforce *inter se* covenants entered into by each with the grantor, should be confined to cases where there has been proof of a general building plan or scheme. See Mulligan v. Jordan (1892) 50 N. J. Eq. 363.

<sup>9</sup>Ames, Specific Performance, 17 Harv. L. Rev. 184.

<sup>10</sup>Ames, Specific Performance, *supra*.

<sup>11</sup>"The doctrine, rightly considered, appears to me to be either an extension in equity of the doctrine of Spencer's Case to another line of cases, or else an extension in equity of the doctrine of negative easements." Jessel, M. R., in London Co. v. Gomm (1882) L. R. 20 Ch. D. 562, 583.

<sup>12</sup>Peck v. Conway (1876) 119 Mass. 546.

<sup>13</sup>Brewer v. Marshall *supra*.

<sup>14</sup>Eastwood v. Lever (1863) 4 De G. J. & S. 113, 126.

<sup>15</sup>Thacher v. Columbia College (1882) 87 N. Y. 311.

<sup>16</sup>Roper v. Williams (1822) Turn. & R. 18.